

**U.S. BANKRUPTCY COURT  
District of South Carolina**

Case Number: 07-01255-dd

**ORDER DISMISSING CASE**

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby **ORDERED**.

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**FILED BY THE COURT  
05/17/2007**



Entered: 05/21/2007

US Bankruptcy Court Judge  
District of South Carolina

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF COLUMBIA**

In re:

Henry Ellis, Jose P. Ellis, f/d/b/a Josie's Restaurant,  
  
Debtors.

Case No. 07-01255-dd  
Chapter 7

**ORDER DISMISSING CASE**

This proceeding comes before the Court on the motion of the United States Trustee for Region Four (the UST) pursuant to 11 U.S.C. §§ 109(h)(1), 521(b) and 707(a) to dismiss this case due to the debtors' failure to obtain credit counseling with 180 days prior to the petition filing date and to file proper credit counseling certificates. The Court has dismissed this case without prejudice by a judgment entered on April 14, 2007. At the time of the entry of this order, the debtors have refiled for relief under chapter 7, case no. 07-02188-dd, which was not prohibited by the Court's earlier judgment. The Court issues this order to address the specific facts of the present case and to further delineate the reasoning of the Court.

The Court has jurisdiction to hear and decide this matter. 28 U.S.C. § 1334. This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

**THE FACTS**

1. The debtors, Henry Ellis and Jose P. Ellis, filed the present chapter 7 case on March 8, 2007. The debtors previously filed a chapter 13 case on April 28, 2006, case no. 06-01745-jw, but the case was dismissed by the Court on November 15, 2006, upon the trustee's motion based upon the debtors' failure to make payments under their confirmed plan.

2. George G. Reaves, Esquire, served as counsel to the debtors in the present case and in the prior chapter 13 case.

3. The debtors in their chapter 13 case filed credit counseling certificates in compliance with 11 U.S.C. § 521(b)(1) which demonstrated their compliance with 11 U.S.C. § 109(h).<sup>1</sup>

When the debtors filed the present chapter 7 case, the debtors and their counsel failed to realize that no credit counseling had been obtained within 180 days prior to this second petition date.

Each debtor, however, filed Exhibit D to the petition incorrectly stating under oath that a briefing from a credit counseling agency approved by the UST had been obtained within 180 days of the petition filing.

4. The UST moved to dismiss this case because the debtors had not filed valid certificates from an approved nonprofit budget and credit counseling agency that had provided a briefing to the debtors describing the services the debtors received during the 180 days prior to the petition date. The UST argues that the failure to timely obtain credit counseling for the present case makes the debtors ineligible to file for bankruptcy relief.

5. The debtors again obtained credit counseling, after the filing of the UST's motion. They have now filed with the court the appropriate certificates with respect to this second counseling session. The UST argues, however, that the failure to file valid certificates with the petition, in the absence of a timely request for a temporary waiver or permanent exemption allowed under § 109, cannot be cured post-petition.

6. The debtors have not filed with the Court a certification that describes exigent circumstances that merit a waiver of the requirement of credit counseling or shows that the

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<sup>1</sup> Further reference to Title 11 of the United States Code will be by section number only.

debtors requested credit counseling services from an approved agency but were unable to obtain the services during the five-day period beginning on the date the debtors made the request.

§ 109(h)(3)(A).

7. The debtors did not timely request from the Court a permanent exemption under § 109(h) from the prepetition credit counseling requirement.

8. Credit counseling services were reasonably available to the debtors in this district at all relevant times. The debtors reside in this district.

9. Counsel for the debtors acknowledges that the failure to obtain credit counseling before filing the present case was simply an oversight on his part.

### **THE LAW**

ISSUE: May an individual debtor who has not met the credit counseling requirement of §109(h) cure this requirement post-petition in the absence of a temporary waiver or permanent exemption when credit counseling services were readily available to the debtor?

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. no. 109-8, 119 Stat.23, imposed a prepetition credit counseling requirement upon individual debtors seeking bankruptcy relief. Section § 109(h)(1) provides in relevant part:

[A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

In addition to the requirement that an individual debtor participate in a credit counseling session, §521(b)(1) also directs the debtor to file with the Court “a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section

109(h) describing the services provided to the debtor.” If the counseling agency prepared a repayment plan, this document must be filed with the credit counseling certificate.

This Court ruled in *In re McBride*, 354 B.R. 95 (Bankr. D.S.C. 2006), that an individual debtor must timely obtain credit counseling and file a certificate to that effect “unless one of three exceptions to the requirement applies.” *Id.*, at 99. The three exceptions are: (1) that the UST has determined for the district where the debtor resides that counseling is not reasonably available; (2) that the debtor requested credit counseling prepetition but was unable to obtain it due to exigent circumstances prior to filing; and (3) that the debtor could not complete the credit counseling requirement due to incapacity, disability or military service as defined by § 109. The debtors in the present case admit, and rightly so, that the facts of this case do not come within any of the three exceptions. Therefore, under *McBride*, only one choice remains . . . compliance.

The debtors contend, however, that, the Court could equitably rule that the mere oversight of counsel could be cured by the postpetition filing of a proper certificate reflecting postpetition counseling. Equity, however, may not be exercised contrary to the unambiguous language of §109 in the absence of any evidence which would bring the debtors within one of the statutory exceptions. Further, the UST brought this motion early in the case, and no prejudice has resulted to the debtors other than that caused by their own oversight and that of their counsel. Ruling with the debtors based on the facts of this case would effectively gut § 109 and allow debtors to offer a myriad of excuses, including their own neglect and negligence and that of their counsel, as valid grounds for ignoring the unambiguous language of the statute.

Because the debtors failed to timely obtain prepetition credit counseling and to file proper certificates to that effect, the debtors are ineligible to file for chapter 7 bankruptcy relief

and cause exists to dismiss this case under § 707(a). The Court's ruling is consistent with *McBride, supra, In re Dansby*, 340 B.R. 564 (Bankr. D.S.C. 2006), and *In re Herndon*, misc. pro. 06-90004-jw (Bankr. D.S.C. Dec. 21, 2006). Therefore, this case should be and hereby is dismissed without prejudice.

Counsel for the debtors shall refund to the debtors all attorneys fees paid to him plus the filing fee for the case within ten days from the entry of this order, and he shall provide proof of this refund to the UST within this same period. If the debtors use Mr. Reaves to file another bankruptcy case, he shall not charge the debtors any additional fees for the same services agreed upon in this case, and he shall not charge the debtors another filing fee or any other duplicate cost for the filing of the new case.

AND IT IS SO ORDERED.